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Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals violated the Due Process Clause by approving the trial court's refusal to review the size of the punitive damage award.

2. Whether the court of appeals' failure to conduct any appellate review of the size of the punitive damage award violates the Due Process Clause.

3. Whether the $4.125 million punitive damage award is grossly excessive in violation of the Due Process Clause.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

The caption of the case contains the names of all of the parties in the court below. Pursuant to Rule 29.6 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.

Arabian Fiberglas Insulation Company

Asahi Fiber Glass Company, Ltd.

Fiberglas Colombia, S.A.

Polyplaster, S.A.

Scandinavian Glasfiber AB

Vitro-Fibras, S.A.

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PATRICK J. BRENNAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App., *infra*, 1a-2a) is not reported, but the judgment is noted at 61 F.2d 910 (Table). The opinion of the District Court of Guam, Appellate Division (App., *infra*, 3a-29a) is not reported. The decision and order

of the Superior Court of Guam (App., *infra*, 30a-39a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1995. A timely petition for rehearing was denied on August 24, 1995. App., *infra*, 40a-41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1 (second sentence).

In pertinent part, 48 U.S.C. § 1421b(u) provides:

> "The following . . . amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not previously been extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the first to ninth amendments inclu-

sive . . . [and] the second sentence of section 1 of the fourteenth amendment."

STATEMENT OF THE CASE

I. Factual Background

Since its formation in 1938, OCF has engaged primarily in the manufacture of various fiberglass products. Beginning in 1953, OCF distributed a unique, asbestos-containing insulation material known as Kaylo. From 1958 until 1972, OCF also manufactured Kaylo. In 1972, OCF ceased production of asbestos-containing Kaylo. OCF C.A. Br. 2.

Kaylo contained less asbestos than other contemporary asbestos insulations. Normal handling and use of Kaylo resulted in much less airborne dust than other asbestos-containing products. Tests conducted during the 1960s indicated that Kaylo could be manufactured, cut, and used without exceeding the asbestos exposure levels then thought to be safe by government and industry. OCF C.A. Br. 2, 31; OCF C.A. Reply Br. 13-14.

In recent years, OCF has been sued by hundreds of thousands of persons claiming to have been injured by exposure to Kaylo. As of March 31, 1993, OCF had already resolved approximately 107,800 asbestos personal-injury claims and had taken a cumulative charge of $943 million against earnings to account for the estimated future *uninsured* costs of asbestos claims through 1999. As of February 1994, 38 juries had imposed some $77 million in punitive damage awards on OCF in asbestos cases. OCF C.A. Br. 24-27 & nn. 26-27.

Respondent was a former pipe insulator who worked on several different job sites with various asbestos-containing insulation products, including Kaylo. Thereafter, respondent was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos-related diseases. App., *infra*, 31a; OCF C.A. Br. 2-3.

II. Proceedings in the Trial Court

Respondent brought suit against OCF and other former manufacturers of asbestos-containing products in the Superior Court of Guam pursuant to Guam Civ. Proc. Code § 82 and 48 U.S.C. § 1424-1. The case was tried to a jury.

During the punitive damage phase of the trial, OCF introduced extensive evidence demonstrating that Kaylo could be manufactured and used in compliance with the Threshold Limit Value ("TLV") that was applicable to asbestos-containing products at the time respondent was working as a pipe insulator. The TLV was an asbestos exposure limit recommended by the American Conference of Governmental Industrial Hygienists and adopted by various jurisdictions, including New Jersey (where OCF manufactured Kaylo) and Ohio (where OCF's headquarters were located). *See* OCF C.A. Br. 31; OCF C.A. Reply Br. 13-14.

The jury returned verdicts in favor of respondent, awarding $2.5 million in compensatory damages and $4.125 million in punitive damages against OCF. App., *infra*, 31a. OCF filed timely post-trial motions for judgment notwithstanding the verdict, a new trial, or a remittitur, raising several grounds of error. In particular, OCF asserted that the punitive damages

award was unconstitutionally excessive and was imposed in violation of the procedural and substantive safeguards required by the Due Process Clause. App., *infra*, 31a; CR 2022 at 48, 54-59, 65.[1]

On November 4, 1992, the trial court issued a written opinion denying OCF's challenges to the punitive damage award. App., *infra*, 30a-39a. Focusing almost solely on *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and on the jury instructions regarding punitive damages, the trial court concluded that the procedures utilized at trial satisfied constitutional requirements. App., *infra*, 32a-38a. The court did not, however, address OCF's contention that the punitive award was excessive under the Due Process Clause. Instead, the court concluded that because "the punitive award procedures utilized in this case provided sufficient protection of the defendants interest and since the jury's discretion was exercised within reasonable constraints, due process is satisfied." *Id.* at 39a.

III. Proceedings in the Appellate Division

OCF appealed to the Appellate Division of the District Court of Guam pursuant to Guam Code of Civil Procedure §§ 62-63 and 48 U.S.C. § 1424-3(a). OCF claimed, *inter alia*, that the $4.125 million punitive damage award was unconstitutionally excessive in violation of the Due Process Clause. OCF App. Div. Br. 33-39, 54-66.

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[1] "CR" refers to the clerk's record or docket sheet number assigned to the cited pleading in the trial court.

On October 19, 1993, the Appellate Division issued an opinion affirming the judgment of the trial court in all respects. App., *infra*, 3a-29a. Like the trial court, however, the Appellate Division failed to conduct any independent review of the size of the punitive damage award. Instead, while recognizing that OCF had challenged the punitive damage award as unconstitutionally excessive (*id.* at 22a), the court did not conduct any meaningful review of that award, explaining that the award "*presumably* reflects the jury's and the trial court's assessment" of the evidence. *Id.* at 28a (emphasis added).

IV. Proceedings in the Court of Appeals

OCF appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291, 28 U.S.C. § 1294(4), and 48 U.S.C. § 1424-3(c). OCF contended, *inter alia*, that (1) the award of punitive damages is unconstitutionally excessive in violation of the substantive provisions of the Due Process Clause, and (2) the lower courts denied OCF its procedural due process rights by failing to conduct the requisite review of the size of the punitive damage award. OCF C.A. Br. 15-31.

On July 11, 1995, a divided panel of the court of appeals affirmed. App., *infra*, 1a-2a. The majority's entire discussion of the punitive damages issue is as follows:

> Finally, the trial court did not err in affirming the punitive damages award. The court conducted the review necessary to satisfy the requirements of due process.

App., *infra*, 2a. Circuit Judge Kozinski dissented. *Id.* at 2a.

OCF filed a petition for rehearing and suggestion of rehearing in banc. On August 24, 1995, the panel denied the petition by a divided vote. App., *infra*, 40a-41a.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Approving The Trial Court's Failure To Review The Size Of The Punitive Damages Award Is Squarely Contrary To This Court's Decision In *Honda Motor Co. v. Oberg*

In *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), this Court unambiguously held that the "denial of judicial review of the size of punitive damage awards violates the Due Process Clause." As the *Honda* Court explained, "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," and the need for such review has only increased in recent years as "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Id.* at 2335, 2340.

In this case, despite its recognition (App., *infra*, 31a) that OCF had properly challenged the size of the punitive damage award, the trial court failed to set forth any reasons at all for upholding the size of that award. Moreover, the court's order denying OCF's post-trial motions reveals that the court conducted no independent review whatsoever of the amount of punitive damages awarded by the jury. Rather, after determining

that the jury instructions provided sufficient guidance to satisfy the dictates of due process, the court concluded: "*since the jury's discretion was exercised within reasonable constraints, due process is satisfied.*" App., *infra*, 39a (emphasis added).[2]

Thus, it is evident that the trial court based its ruling on the assumption that jury instructions alone can satisfy the requirements of the Due Process Clause without any need for independent judicial review of the size of a punitive damage award. That assumption, however, is squarely inconsistent with this Court's decision in *Honda*, which expressly rejected that very argument: "Respondent's final safeguard, proper jury instruction, is a well-established and, of course, important check against excessive awards. *The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict.*" 114 S. Ct. at 2341 (emphasis added). In addition to proper jury instruction, therefore, judicial review is constitutionally

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[2] Similarly, as noted above (*supra* p. 6), the Appellate Division failed to conduct any review of the size of the punitive award. Moreover, the Appellate Division improperly deferred to the trial court on the question of the appropriate scope of judicial review, apparently because of its belief that it lacked the power to provide guidance to the trial court on that issue. *Id.* at 24a n.9 ("We cannot direct the Guam courts to undertake a specific type of review of punitive damages awards."). That belief was erroneous. Federal courts reviewing Guam decisions act in effect as state appellate courts (*see, e.g., Guam v. Yang*, 850 F.2d 507, 509-11 & n.4 (9th Cir. 1988) (en banc)), and in any event federal courts are authorized -- and obligated -- to enforce the Due Process Clause.

required as a further safeguard against arbitrary and excessive punitive damage awards. *Id.* at 2341-42.

Despite the trial court's clear violation of the standards enunciated in *Honda*, the Ninth Circuit rejected OCF's request (OCF C.A. Br. 17-18) to remand the case in order to permit the trial court to conduct the requisite judicial review of the size of the punitive damage award. Without so much as citing this Court's decision in *Honda*, the court of appeals simply concluded that the trial court "conducted the review necessary to satisfy the requirements of due process," App., *infra*, 2a, even though that review was limited to a consideration of the *procedures* followed by the jury and did not extend to reviewing the *size* of the award.

Thus, the Ninth Circuit clearly violated the express reasoning and holding of this Court's decision in *Honda* by approving the trial court's failure to review the size of the punitive damage award. That error is unquestionably an important one, as it involves the very issue that was deemed sufficiently substantial to merit this Court's attention in *Honda*. Under these circumstances, certiorari is warranted to correct the court of appeals' clear disregard of an opinion of this Court. *See* Sup. Ct. R. 10(a) and (c) (certiorari appropriate where "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" or "has decided an important federal question in a way that conflicts with

relevant decisions of this Court").[3] Moreover, because the decision below is directly inconsistent with *Honda*, the judgment of the court of appeals should be summarily reversed and the case remanded in order to permit the trial court to conduct the requisite review of the punitive damage award.[4]

II. The Court Of Appeals' Failure To Conduct Any Appellate Review Of The Size Of The Punitive Damage Award Conflicts With Decisions Of Numerous Other Appellate Courts And Violates Due Process

In *Honda*, this Court specifically noted the importance of appellate review of punitive damage awards, observing that "[t]he most exhaustive study of punitive damages establishes that over half of punitive damage awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." 114 S. Ct. at 2341 n.11. Similarly, in

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[3] Moreover, the court of appeals' decision conflicts with the decisions of numerous lower federal and state courts requiring adequate and meaningful trial court review of the size of punitive damage awards. *See, e.g., Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404, 1421 (6th Cir. 1995); *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1464 (11th Cir. 1991); *Sprague v. Walter*, 656 A.2d 890, 928 (Pa. App. 1995); *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908-09 (W. Va. 1991). Accordingly, the decision below would be worthy of review even if it were not directly inconsistent with this Court's decision in *Honda*.

[4] In the alternative, the Court should grant review to give plenary consideration to this question and resolve the conflict among the lower courts. *See supra* note 3.

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), this Court emphasized that appropriate "appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 499 U.S. at 21.

Not surprisingly, therefore, numerous state and federal appellate courts have held that the Due Process Clause requires meaningful and adequate appellate review of the size of punitive damage awards. Thus, in *Ezzone v. Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994), *cert. denied*, 115 S. Ct. 1958 (1995), for example, the Iowa Supreme Court held that it was "obliged as a matter of constitutional law to assume responsibility for reviewing the appropriateness of the size of punitive damage awards" and that "it is a denial of due process for a state to allow punitive damages without according *appellate* review of the appropriateness of the amount." 525 N.W.2d at 398-99 (emphasis added).

Similarly, in *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. Ct. 1995), the court held as follows: "The United States Supreme Court has clearly indicated that the trial *and appellate* courts of the various states must provide meaningful review of the amount of punitive damages awarded by a jury in any given case." *Id.* at 928 (emphasis added). Numerous other decisions are to the same effect. *See, e.g., Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1477 (10th Cir. 1995) ("The final procedural due process safeguard is our [*i.e.*, the appellate court's] substantive review of the amount of the punitive damages award."); *Garnes v. Fleming Landfill, Inc.*, 413

S.E.2d 897, 908 (W. Va. 1991) ("Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia," including "a meaningful and adequate appellate review").

In this case, by contrast, despite OCF's explicit claim that the punitive damages award was unconstitutionally excessive (OCF C.A. Br. 18-31), neither of the appellate courts hearing OCF's appeals conducted *any* substantive review of the size or propriety of that award. Instead, the two appellate courts abdicated their responsibility by giving absolute deference to the *trial* court. The Appellate Division relied on its assumption that the punitive award "*presumably* reflects the jury's and the trial court's assessment" of the evidence, App., *infra*, 28a (emphasis added), and the court of appeals merely concluded (erroneously, as explained above) that the trial court "conducted the review necessary to satisfy the requirements of due process." App., *infra*, 2a.

The failure of the two appellate courts to conduct an independent substantive review of the size of the punitive award amounts to a separate constitutional violation under the reasoning of the cases cited above, because those cases make clear that trial court review alone is insufficient to satisfy the dictates of the Due Process Clause. Thus, the decision below creates an irreconcilable conflict among the lower federal and state appellate courts, and this Court's plenary review is warranted to resolve the conflict. *See* Sup. Ct. R. 10(a).

III. The $4.125 Million Award of Punitive Damages Is Grossly Excessive In Violation Of The Due Process Clause And The Factors Presented In The *BMW* Case

A. This Court Has Already Granted Certiorari To Address The Question Presented Here

As this Court recognized in *Honda*, "the Constitution imposes a substantive limit on the size of punitive damage awards." 114 S. Ct. at 2335. In *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this Court granted certiorari to decide, *inter alia*, what standards are to be applied in determining whether a punitive damage award is unconstitutionally excessive. *See* Pet. for Cert. in No. 94-896 ("*BMW* Pet.") at I (raising question whether the challenged punitive award "is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment"). BMW's petition for a writ of certiorari pointed to various factors that demonstrate the excessiveness of the award in that case. *See BMW* Pet. 18-25.

In this case, of course, OCF has consistently argued that the punitive damage award violates the substantive component of the Due Process Clause. *See supra* pp. 4-6. Moreover, many of the precise factors that demonstrate the excessiveness of the award in *BMW* are also present here, making this case a particularly strong candidate for review. For example, BMW argues that "adherence to industry custom . . . constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size." *BMW* Pet.

Br. 40-41; *see BMW* Pet. 18-19. In this case, OCF likewise argued vigorously below that its "compliance with the applicable . . . industry standards negates any basis for the imposition of punitive damages in this case, and renders the punitive award plainly excessive." OCF C.A. Br. 31; *see also* OCF C.A. Reply Br. 13-14.

Similarly, BMW argues in its brief on the merits that its compliance with statutory disclosure standards adopted in numerous States eliminates any justification for a large award of punitive damages. *BMW* Pet. Br. 37-40 & n.23. By the same token, OCF has consistently taken the position that "[p]unitive damages do not serve a legitimate deterrent or retributive function where, as here, the defendant is being punished for conduct that complied with applicable government . . . safety standards." OCF C.A. Br. 31.

In addition, BMW argues at length that the punitive award imposed on it is unconstitutionally excessive in part because that case involves a "mass tort" and therefore creates the potential for multiple punitive awards arising out of the same course of conduct. *BMW* Pet. Br. 45-50. As BMW asserts, "[t]he question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?" *Id.* at 46; *see also BMW* Pet. 21.

Once again, precisely the same factor is present in this case. OCF has consistently argued that the excessiveness of the punitive damage award imposed in this case is demonstrated by the existence of, and potential for, numerous other claims of injury and punitive

awards arising out of the same course of conduct, *i.e.*, OCF's manufacture and distribution of asbestos-containing Kaylo. *See* OCF C.A. Br. 18-20, 23-28; OCF C.A. Reply Br. 7-12. Just as in *BMW*, moreover, the award at issue in this case would plainly be excessive "if every other plaintiff recovered the same amount of punitive damages" (*BMW* Pet. Br. 46). Indeed, if the punitive damage award imposed in this case against OCF were imposed just in the other asbestos cases brought against OCF in the Superior Court of Guam, OCF would be exposed to well over $1 billion in punitive damages in Guam alone.

In short, this case raises the same question as that presented in *BMW*, and it does so in a very similar legal and factual setting. Given the obvious and substantial similarities between the two cases, it is readily apparent that a favorable decision in *BMW* would have a direct and substantial impact on the outcome of this case. Accordingly, if this petition is not otherwise granted, it should be held pending this Court's decision in *BMW* and then disposed of in light of the disposition of that case.[5]

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[5] OCF notes that this Court recently granted a stay pending the filing and disposition of a writ of certiorari in *Owens-Corning Fiberglas Corp. v. Rekdahl*, No. A-241 (Sept. 29, 1995). The issue raised in the stay application in that case is virtually indistinguishable from that presented here, and the Court's decision to grant the stay therefore supports OCF's contention that, at the very least, this petition should be held for *BMW*.

B. The Lower State And Federal Courts Are Divided Over The Standards To Be Applied In Reviewing Punitive Damages Awards

The *BMW* petition argues persuasively that, despite this Court's prior decisions in this area,[6] punitive damage awards continue to skyrocket and the lower state and federal courts continue to apply inconsistent standards and reach conflicting results in reviewing the size of punitive damage verdicts. *BMW* Pet. 26-29. Thus, the *BMW* petition demonstrates that the lower federal and state courts are in substantial need of additional guidance on the proper approach to the excessiveness inquiry. This Court's decision to grant review in *BMW* establishes the importance and significance of that question. Review of that same question would therefore be warranted in this case if the Court's disposition of *BMW* were to leave that question unresolved.

Indeed, this case is a particularly strong candidate for review in that regard, because the decision below is directly inconsistent with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993), which involved an asbestos personal injury suit against OCF arising out of the same course of conduct at issue here. In *Dunn*, the court of appeals held that the district

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[6] *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

court gave "insufficient consideration to the effect of successive punitive awards in asbestos litigation" when it remitted a $25 million award against OCF to $2 million. 1 F.3d at 1391. Accordingly, the en banc court further reduced the award against OCF to $1 million, explaining that an award of that size was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added).[7]

Similarly, numerous other courts have emphasized that the existence of, or potential for, other punitive damage awards against the same defendant for the same course of conduct raises due process concerns and is an appropriate factor to be considered in determining whether a particular award is grossly excessive.[8] Although OCF argued this point at length to the

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[7] Five members of the court dissented on the ground that the Due Process Clauses bars *any* further awards of punitive damages against OCF because the amounts already awarded in prior litigation are more than necessary to achieve fully the goals of punishment and deterrence. *Id.* at 1400-05 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.); *id.* at 1405 (Becker, J., dissenting).

[8] *See, e.g.*, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (citing with approval the Alabama Supreme Court's consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires consideration of "other civil or criminal penalties levied on the defendant"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also In re School Asbestos Litig.*, 789 F.2d 996,

court of appeals (*see* OCF C.A. Br. 18-20, 23-28), that court (unlike the Third Circuit in *Dunn v. HOVIC*) was unpersuaded. Plenary review of this issue is therefore warranted if this Court's disposition of *BMW* does not itself require reconsideration of the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below summarily reversed, and the case remanded for further proceedings because of the court of appeals' failure to require the trial court to review the size of the punitive damage award. In the alternative, the petition for a writ of certiorari should be granted and the case set for plenary consideration. Finally, if the petition is not granted immediately, it

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1005 (3d Cir.), *cert. denied*, 479 U.S. 852 and *cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (Friendly, J.); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234, 1236 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889, 213 Cal. Rptr. 547 (1985).

should be held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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